IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELVIO PEREZ MEDINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal No. 14-364
Civil No. 16-3279

PAPPERT, J. **January 30, 2018**

MEMORANDUM

On July 9, 2014, a grand jury returned a five-count indictment against Elvio Perez Medina charging him with distribution of heroin, possessing heroin with the intent to distribute, possessing a firearm in furtherance of a drug trafficking crime and unlawful reentry into the United States. (ECF No. 1.) Medina pled guilty to all counts on May 13, 2015. (ECF No. 37.) He subsequently withdrew his guilty plea[1] (ECF Nos. 42, 43) and pled guilty pursuant to a new Guilty Plea Agreement on August 7, 2015 (ECF Nos. 45, 46).

The Pre-Sentence Investigation Report established an advisory sentencing guideline range of 121 to 151 months imprisonment and Count Four, the gun possession charge, required a mandatory 60 month consecutive sentence, making the final guideline range 181 to 211 months. Judge Dalzell sentenced Medina to 180

[1] During his initial plea, it appeared that Medina was classified as a Career Offender. (Pet. Mot. at 2 n.1; Opp. at 2.) The Pre-Sentence Report correctly determined that Medina was not a Career Offender. (Opp. at 2.)

months imprisonment on August 14, 2015. (Pet. Mot. at 6–7, ECF No. 68.) Medina subsequently filed his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 alleging that his counsel was ineffective and that as a result his guilty plea was not knowing, voluntary or intelligently made. (Pet. Mot. at 8.) The United States responded (Opp., ECF No. 79) and the Court denies the Motion for the reasons that follow.

I

A district court may vacate a petitioner's sentence if it finds that the "judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the [defendant] as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). The petitioner bears the burden of proving that his conviction is illegal. *United States v. Davies,* 394 F.3d 182, 189 (3d Cir. 2005). Further, a petitioner "must clear a significantly higher hurdle than would exist on direct appeal" to obtain relief. *See United States v. Cleary*, 46 F.3d 307, 310 (3d Cir. 1995) (quoting *United States v. Frady,* 456 U.S. 152, 166 (1982)).

A

The Supreme Court's two-part test in *Strickland* governs claims for ineffective assistance of counsel. "To succeed on such a claim, the petitioner must demonstrate (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that the petitioner suffered prejudice as a result of the deficiency." *Blystone v. Horn*, 664 F.3d 397, 418 (3d Cir. 2011) (citing *Strickland*, 466 U.S. at 687)). With respect to *Strickland*'s first prong, there is a "strong presumption" that counsel's performance was not deficient. *Jermyn v. Horn*, 266 F.3d 257, 282 (3d

Cir. 2001). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. With respect to prejudice, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To make this showing, the "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

First, Medina claims that his counsel was ineffective because she failed to investigate the crimes charged. (Pet. Mot. at 8.) Specifically, he alleges that the "Government's Change of Plea Agreement…does not mention a firearm offense."[2] (*Id.* at 3.) At Medina's change of plea hearing, the Assistant United States Attorney reviewed the Guilty Plea Agreement "line by line, paragraph by paragraph." (Hr'g Tr., Aug. 7, 2015, 17:8-11, ECF No. 64.) The prosecutor explained that according to the Agreement, Medina "agrees to plead guilty to Counts One through Five of the Indictment…[and the] charges arise from…the recovery of heroin and the firearm from his car at home in April 2014." (*Id.* at 17:16-21.) Earlier in the hearing, the prosecutor explained Count Four, possession of a firearm in furtherance of a drug trafficking crime. (*Id.* at 7:19-8:2; 9:3-8.) Medina acknowledged that he understood the charge. (*Id.* at 10:3-5.)

Second, Medina claims that his counsel incorrectly informed him that his sentence for Count Four "would not have any impact on his overall sentence" and that

[2] Medina is clearly referencing the Guilty Plea Agreement.

he would only face 80 to 90 months imprisonment. (Pet. Mot. at 8.) Even if Medina's allegation is true, he is not able to establish the prejudice prong under *Strickland*. The Third Circuit has held that "an erroneous sentencing prediction by counsel is not ineffective assistance of counsel where, as here, an adequate plea hearing was conducted." *United States v. Shedrick,* 493 F.3d 292, 299 (3d Cir. 2007); *see also United States v. Jones,* 336 F.3d 245, 254 (3d Cir. 2003) (stating "counsel not ineffective for allegedly promising defendant a sentence of 'no more than 71 months' where defendant was advised in open-court colloquy of potential maximum sentence and there were no other promises regarding sentence") (citing *Shedrick*) and *United States v. Mustafa,* 238 F.3d 485, 492 (3d Cir. 2001) ("[A]ny alleged misrepresentations that [defendant's] former counsel may have made regarding sentencing calculations were dispelled when defendant was informed in open court that there was no guarantee as to sentence.").

Medina's guilty plea colloquy was adequate and fails to show that he was prejudiced in any way by whatever his attorney may or may not have told him. The Assistant United States Attorney explained the specific charges against Medina and stated the maximum sentences applicable to those counts. (*Id.* at 8:13-9:16.) In his explanation, he explicitly noted that Count Four required a "mandatory minimum sentence of five years in prison that must run consecutive to any other sentence…." (*Id.* at 9:3-8.) He further stated that the total maximum sentence was up to life in prison with a mandatory minimum prison sentence of fifteen years. (*Id.* at 9:17-18.) Medina indicated that he understood. (*Id.* at 10:3-5; 13:1-4.)

Medina also told the judge that before signing the Guilty Plea Agreement he spoke to his attorney about it, understood it and indicated that it was his choice to sign

it. (*Id.* at 16:1-21; 17:4-7.) Most importantly, the court explained to Medina that "sentencing is very complicated" and that he "never know[s] what the sentence will be until the very end of the sentencing hearing." (*Id.* at 23:32-25.) He stated:

> And so all I can say for sure right now is that there's a floor on your sentence of 15 years, which is 180 months, and the ceiling is life imprisonment. And right now, that's a lot of daylight between life imprisonment and 180 months. And right now, nobody in this courtroom, especially Judge Dalzell, can tell you what your sentence will be. I simply don't know. Understand?

(*Id.* at 26:16-22.) Medina replied, "Yes, sir." (*Id.* at 26:15.) Based on the colloquy at his change of plea hearing, Medina is unable to establish a claim for ineffective assistance of counsel. *See Jones,* 336 F.3d at 254.

II

When a district court denies a Section 2255 motion, a petitioner may only appeal if the district court grants a certificate of appealability. 28 U.S.C § 2253. Section 2253 "permits the issuance of a [certificate of appealability] only where a petitioner has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted). Medina must therefore "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Since no reasonable jurist would disagree with the Court's assessment of Medina's claims, no certificate of appealability will issue. *See id.*

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.